ORIGINAL

No. 21-6543

In The

Supreme Court of the United States

Craig Steven MacKenzie,
Pro Se Petitioner

v.

Marcia L. Fudge, HUD Secretary, and the U.S. Dept. of Housing and Urban Development

Merrick B. Garland, U.S. Attorney General, and the U.S. Dept. of Justice
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the U.S. Court of Appeals for the District of Columbia deprive petitioner of a full and fair opportunity to be heard by mis-applying the judicial doctrine of *res judicata*, claim preclusion (*see* a), *infra*.) and issue preclusion (*see* b), *infra*.), when the prior Judgment is: a) "a first decision supported by findings that deny the power of the court to decide the case on the merits and by findings that go to the merits", and b) "a judgment of a court of first instance based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone", contradicting numerous U.S. Courts of Appeal who have held otherwise under the same circumstances?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no other known cases in other courts that are directly related to the case in this Court.

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STATUTES AND RULES:

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 23, 2021. (*See* Appendix A)

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 7, 2021. A copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (U.S. Constitution, Amendment V)

STATEMENT OF THE CASE

Petitioner ("MacKenzie"), proceeding *pro se*, filed a March 6, 2015 Complaint in his home district court, the U.S. District Court for the Northern District of Texas (Texas court), against Julian Castro, HUD Secretary and the U.S. Dept. of Housing and Urban Development (HUD), asserting a claim for relief under the Administrative Procedures Act, alleging final agency action and non-final agency actions under the APA's "arbitrary and capricious" standard, for numerous statutory and regulatory violations, plus deprivations of Constitutional rights, all arising from a common nucleus of facts. On May 15, 2015, HUD filed its first Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). MacKenzie timely opposed. After referral, a magistrate judge issued a

recommendation to the Texas court to dismiss the complaint with prejudice on jurisdictional grounds. MacKenzie timely objected. The Texas court declined to accept the recommendation, instead granting leave to MacKenzie to amend his Complaint. MacKenzie timely filed his First Amended Complaint. On June 29, 2015, the Texas court filed its Scheduling Order, which established February 1, 2016 as the deadline for the filing of motions. (Appendix H at 3). On January 22, 2016, HUD filed a second Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). MacKenzie timely opposed. On July 19, 2016, the Texas court issued its ruling and denied HUD's January 22, 2016 second Motion to Dismiss, which required HUD to file its responsive pleading (answer) no later than August 2,

the Second Amended Complaint (*See* Fed. R. Civ. P. 5, defining, and controlling service of, "amended pleadings"). Five days later, on March 21, 2017, MacKenzie responded to the Order to Show Cause demonstrating that he had served DOJ by USPS certified mail (*See* 28 U.S.C. § 1391(e)(2)) in August, 2016 and submitted USPS tracking reports plus signed return postcards; the U.S. Attorney's Office ("USAO") had been served by the Texas court's ECF on August 2, 2016 (*See* Fed. R. Civ. P. 5(b)(2)(E)). DOJ had failed to respond to the 2nd Amended Complaint by October 2, 2016. On March 30, 2017, MacKenzie filed a motion seeking reconsideration of the Texas court's March 16, 2017 "final agency action" ruling, demonstrating, *inter alia*, that the Texas court's interpretation of 5 U.S.C. § 704

contravened this Court's opinion in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Also on March 30, 2017, HUD filed its responsive pleading (Answer) in the Texas court, eight months past due, without demonstrating "excusable neglect". On April 11, 2017, the Texas court inexplicably, flatly denied MacKenzie's March 30, 2017 Motion for Reconsideration, in a one sentence order. On April 14, 2017, the Texas court ordered MacKenzie to effect service on DOJ in accordance with both Rule 4(i) and Rule 4(c)(2). Under threat of dismissal, MacKenzie obeyed the Texas court's order, serving DOJ and USAO (again). On June 2, 2017, HUD filed its fourth Motion to Dismiss under Fed. R. Civ. P. 12(c), more than sixteen months after the Scheduling Order deadline, but HUD failed to request a

modification of the Scheduling Order and failed to demonstrate good cause, nor did HUD demonstrate "excusable neglect". MacKenzie timely opposed. On June 19, 2017, sixteen and one-half months after the Scheduling Order deadline and more than eight months after their responsive pleading had become due on October 2, 2016, DOJ filed its Motion to Dismiss under Rules 12(b)(1) and 12(b)(6), but DOJ failed to request a modification of the Scheduling Order and failed to demonstrate good cause, nor did DOJ demonstrate "excusable neglect". MacKenzie timely opposed, and requested leave to amend his Complaint. On July 5, 2017, MacKenzie filed his motion seeking reconsideration of the Texas court's April 14, 2017 order regarding service of the Second Amended Complaint to DOJ, describing the

conflicting requirements between Rules 4(c) and 4(i). The Texas court never responded to MacKenzie's July 5, 2017 Motion for Reconsideration. On November 22, 2017, the Texas court issued its third ruling, granting HUD's untimely June 2, 2017 motion to dismiss and granting DOJ's improper, untimely June 19, 2017 motion to dismiss (Appendix E). Also on November 22, 2017, the Texas court issued its Judgment, incorporating its: 1) July 19, 2016 Order denying HUD's January 22, 2016 improper, but timely motion to dismiss; 2) March 16, 2017 Order granting HUD's improper, untimely Rule 12(b)(6) motion to dismiss under Rule 12(b)(1); 3) March 16, 2017 Order granting, in part, HUD's improper, untimely Rule 12(b)(6) motion to dismiss; 4) November 22, 2017 Order granting HUD's

untimely Rule 12(c) motion to dismiss; 5) November 22, 2017 Order granting DOJ's improper, untimely Rule 12(b)(1) motion to dismiss (Appendix D).

On February 10, 2020, MacKenzie, again proceeding *pro se*, filed a Complaint against HUD and DOJ in the U.S. District Court for the District of Columbia ("D.D.C."). MacKenzie's Complaint asserts a claim for relief under the APA, and alleges a "failure to act" as final agency action, under the APA's "unlawfully withheld or unreasonably delayed" standard (5 U.S.C. § 706(1)), and also alleges sixteen non-final agency actions, all arising from a common nucleus of facts. On August 24, 2020, Government-defendants filed a Motion to Dismiss, urging the district court to dismiss MacKenzie's Complaint on grounds, *inter alia*, of *res judicata.* On September 2, 2020,

MacKenzie complied with Local Rule 7(b) and filed his timely Opposition, arguing (and citing binding case law) that: 1) the Texas court's November 22, 2017 Judgment is not a "judgment on the merits", but instead is supported by findings that deny the power of the court to decide the case on the merits and by findings that go to the merits; 2) MacKenzie did not have a "full and fair opportunity to litigate" in the Texas court; 3) there are prior, inconsistent determinations in the Texas court's proceedings; 4) the issue that led to the prior judgment (i.e., sovereign immunity) was not "actually litigated" (instead, it was a *sua sponte* determination by the Texas court); 5) MacKenzie's February 10, 2020 Complaint cured the jurisdictional defect (i.e., sovereign immunity) by clearly alleging a "failure to act" as the final agency

action. Failing to meet their obligation under Local Rule 7(d) and after obtaining an excessive 5-week extension of time (which was opposed by MacKenzie), Government-defendants filed their Reply on October 16, 2020. On October 19, 2021, MacKenzie requested leave to file a surreply. After obtaining leave, MacKenzie filed his Surreply on January 14, 2021 as instructed by D.D.C. On March 18, 2021, D.D.C. issued its ruling and granted Government-defendants' Motion to Dismiss on grounds of *res judicata* (claim preclusion and issue preclusion) (*See* Appendix B); Judgment issued immediately thereafter (Appendix B). On March 18, 2021, MacKenzie filed his timely Notice of Appeal. On May 5, 2021, Government-defendants-appellees filed a Motion for Summary Affirmance in the U.S.

Court of Appeals for the District of Columbia ("D.C. Circuit"). On May 6, 2021, MacKenzie filed his Opposition and Cross-Motion for Summary Reversal. On July 23, 2021, the D.C. Circuit's three-judge panel issued its Order, denying the Motion for Summary Reversal and granting the Motion for Summary Affirmance (Appendix A). On August 6, 2021, MacKenzie filed his Petition for Rehearing En Banc in the D.C. Circuit. On September 7, 2021, the D.C. Circuit issued its Order, denying the Petition for Rehearing En Banc (Appendix C). On September 7, 2021, MacKenzie filed his Motion for a Stay of Issuance of the Mandate [Pending the Filing of This Petition for a Writ of Certiorari in this Court]. On November 2, 2021, the D.C. Circuit's three-judge

panel denied the motion. On November 15, 2021, the D.C. Circuit issued its Mandate.

REASONS FOR GRANTING THE PETITION

An Opportunity to be Heard

With its origins in the Magna Carta, an individual's right to an opportunity to be heard is a fundamental and enduring principle in Anglo-American jurisprudence. This Court has made clear, on numerous occasions, that the opportunity to be heard must be "full" and "fair" under the U.S. Constitution, Amendment V and Amendment XIV. And, this Court has held that, "The preclusive effect of a federal-court judgment is determined by federal common law, *subject to due process limitations*." (*emphasis* added) (*Taylor v. Sturgell*, 553 U.S. 880 (2008), acknowledging the risk of impinging on an individual's Constitutional right to a full and fair opportunity to be heard by the improper application

of claim preclusion and issue preclusion. Discussing "public-law" litigation in *Taylor v. Sturgell*, 553 U.S. 880, 883 (2008), this Court explained that the courts should not proscribe nor confine successive suits in the absence of the adoption of procedures limiting repetitive litigation by Congress.

For uniformity among all U.S. courts, this Court has ultimate authority to determine and declare federal common law concerning the preclusive effect of a federal court judgment. To ensure that individuals receive equal treatment under the law regardless of where their cases are heard, this Court should grant certiorari "to resolve the disagreement among the Circuits over the permissibility and scope of preclusion....." (*Taylor v. Blakey*, 490 F.3d 965

(D.C. Cir. 2007), reversed *sub nom Taylor v. Sturgell,* 553 U.S. 880, 891 (2008)).

Claim Preclusion – The D.C. Circuit's July 23, 2021 panel decision conflicts with the authoritative decisions of other U.S. Courts of Appeal that have considered the issue.

Nearly 232 million Americans, about 70% of the U.S. population, reside within the geographic boundaries of U.S. Courts of Appeal for the 4th, 5th, 6th, 7th, 8th, 9th, and 10th Circuits.[1] Under narrow circumstances, as exist here, those federal courts have adopted an exception to the general rule of claim preclusion, disallowing claim preclusion where: A judgment rendered by a court of first instance, which rests on both "not on the merits" jurisdictional determinations

[1] The only U.S. Courts of Appeal who have not previously considered the issue, or who have declined to follow their sister circuit courts, are the D.C., 1st, 2nd, 3rd, 11th, and Federal Circuits.

as well as "on the merits" determinations, has no claim preclusive effect because such a judgment is not a "final judgment on the merits".[2] Authority is found in the Restatement (Second) of Judgments § 20, comment e,[3] and in 18 Federal Practice § 4421, at

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[2] See: *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 119 (4th Cir. 1989), *Brantley v. Surles*, 718 F.2d 1354, 1360 (5th Cir. 1983), Garwood (Circuit Judge) concurring in the majority opinion, cites Restatement (Second) of Judgments § 20, Comment e, *Remus Joint Venture v. McAnally*, 116 F.3d 180, 184, n.5 (6th Cir. 1997), *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1279 (7th Cir. 1983), *First State Bank of Roscoe v. Stabler*, 914 F.3d 1129 (8th Cir. 2019), *Ruiz v. Snohomish County P.U.D.*, 824 F.3d 1161, 1164-65 (9th Cir. 2016), *Johnson v. Spencer*, 950 F.3d 680 (10th Cir. 2020)

[3] *"Alternative determinations.* A dismissal may be based on two or more determinations, at least one of which standing alone, would not render the judgment a bar to another action on the same claim. In such a case, if the judgment is one rendered by a court of first instance, it should not operate as a bar....Even if another of the determinations, standing alone, would render the judgment a bar, that determination may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta. And, of critical importance, the losing party, although entitled to appeal from both determinations, may be dissuaded from doing so as to the

575–76[4]. Many of these decisions rely on authoritative decisions of sister U.S. Courts of Appeal (*See*, e.g., *Ruiz v. Snohomish County P.U.D.*, 824 F.3d 1161 (9th Cir. 2016), citing *Remus Joint Venture v. McAnally*, 116 F.3d 180, 184, n.5 (6th Cir. 1997), *Pizlo v. Bethlehem Steel Corp.* , 884 F.2d 116, 119 (4th Cir. 1989), and *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1279 (7th Cir. 1983)). The aforementioned federal courts have contributed to federal common law and have participated in developing uniform

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determination going to the "merits" because the alternative determination, which in itself does not preclude a second action, is clearly correct." (Restatement (Second) of Judgments § 20, cmt. e).

[4] "If a first decision is supported both by findings that deny the power of the court to decide the case on the merits and by findings that go to the merits, preclusion is inappropriate as to the findings on the merits." (18 Federal Practice § 4421, at 575–76).

federal rules of *res judicata* (*Taylor v. Sturgell*, 553 U.S. 880, 891 (2008)) that extend additional protections for 232 million Americans' rights to a full and fair opportunity to be heard[5], despite a prior judgment, where narrow circumstances (prior judgment contains determinations with opposite claim preclusive effects) exist, as here. To ensure uniformity, this Court has ultimate authority to determine and declare federal common law concerning the preclusive effect of a federal-court judgment. *Id.*, 553 U.S. 880, *891.

The U.S. District Court for the Northern District of Texas's ("Texas court") November 22, 2017 Judgment[6] contains four alternative determinations:

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[5] U.S. Constitution, Amendment Five
[6] *See* Judgment, Appendix D

two of them are "not on the merits" jurisdictional determinations under Fed. R. Civ. P. 12(b)(1)[7]; two of them are "on the merits" determinations under Fed. R. Civ. P. 12(b)(6)[8] and under Fed. R. Civ. P. 12(c)[9]. Applying the adopted exception, the presence of "alternative determinations" in the prior judgment does not bar MacKenzie's subsequent action in the D.D.C. And, MacKenzie's decision not to appeal the Texas court's Judgment is of no moment.[10]

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[7] *See* March 16, 2017 Memo. Opinion and Order, Appendix F; *See* November 22, 2017 Memo. Opinion and Order, Appendix E.

[8] *See* March 16, 2017 Memo. Opinion and Order, Appendix F

[9] *See* November 22, 2017 Memo. Opinion and Order, Appendix E.

[10] *See* Restatement (Second) of Judgments § 20, cmt. e, explaining how "the rules of res judicata should not encourage or foster appeals in such instances."

Thus, the D.C. Circuit's panel decision of July 23, 2021[11], affirming the D.D.C.'s dismissal of MacKenzie's action, in part based on claim preclusion, conflicts with the authoritative decisions of other United States Courts of Appeal that have addressed the issue.

Issue Preclusion – The D.C. Circuit's July 23, 2021 panel decision conflicts with the authoritative decisions of other U.S. Courts of Appeal that have considered the issue.

More than 296 million Americans, about 90% of the U.S. population, reside within the geographic boundaries of U.S. Courts of Appeal for the D.C., 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th Circuits[12]. Under narrow circumstances, as exist here, those

[11] *See* July 23, 2021 Order, Appendix A

[12] The only U.S. Courts of Appeal who have not previously considered the issue, or who have declined to follow their sister circuit courts, are the 11th and Federal Circuits.

federal courts, including the D.C. Circuit, have adopted an exception to the general rule of issue preclusion, disallowing issue preclusion: If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.[13] Authority is found in the Restatement (Second) of

[13] See: *Stebbins v. Keystone Ins. Co.*, 481 F.2d 501 (D.C. Cir. 1973), *In re Baylis*, 217 F.3d 66 (1st Cir. 2000), *Halpern v. Schwartz*, 426 F.2d 102 (2nd Cir. 1970), *Jean Alexander v. L'Oreal*, 458 F.3d 244 (3d Cir. 2006), *Lisa Lee Mines v. Director, Worker Comp. Programs.*, 86 F.3d 1358 (4th Cir. 1996), *Society of Separationists v. Herman*, 939 F.2d 1207, 1212-14 n. 25 (5th Cir. 1991), *Nat'l Sat. Sports v. Eliadis*, 253 F.3d 900 (6th Cir. 2001), *Peabody Coal v. Spece*, 117 F.3d 1001 (7th Cir. 1997), *Baker Elec. Co-op v. Chaske*, 28 F.3d 1466 (8th Cir. 1994), *Memorex Corp. v. IBM*, 555 F.2d 1379 (9th Cir. 1977), *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292 (10th Cir. 2014)

Judgments § 27, comment i.[14] Many of these decisions rely on authoritative decisions of sister U.S. Courts of Appeal (*See*, e.g., *Stebbins v. Keystone Ins. Co.*, 481 F.2d 501 (D.C. Cir. 1973), citing *Halpern v. Schwartz,* 426 F.2d 102 (2nd Cir. 1970)) (*See also*, e.g., *Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1993), acknowledging *Stebbins v. Keystone Ins. Co.*, 481 F.2d 501 (D.C. Cir. 1973) and *Halpern v. Schwartz,* 426 F.2d 102 (2nd Cir. 1970)). The aforementioned federal courts have contributed to federal common law and have participated in developing uniform federal rules of *res judicata*

[14] *"Alternative determinations by court of first instance.* If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." (Restatement (Second) of Judgments § 27, cmt. i).

(*Taylor v. Sturgell*, 553 U.S. 880, 891 (2008)) that extend additional protections for 296 million Americans' rights to a full and fair opportunity to be heard[15], despite a prior judgment, where narrow circumstances exist, as here. To ensure uniformity, this Court has ultimate authority to determine and declare federal common law concerning the preclusive effect of a federal-court judgment. *Id.*, 553 U.S. 880, *891.

The Texas court's November 22, 2017 Judgment[16] contains four alternative determinations: two of them are "not on the merits" jurisdictional determinations under Fed. R. Civ. P. 12(b)(1)[17]; two

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[15] U.S. Constitution, Amendment Five

[16] *See* Judgment, Appendix D

[17] *See* March 16, 2017 Memo. Opinion and Order, Appendix F; *See* November 22, 2017 Memo. Opinion and Order, Appendix E.

of them are "on the merits" determinations under Fed. R. Civ. P. 12(b)(6)[18] and under Fed. R. Civ. P. 12(c)[19]. Applying the adopted exception, the presence of the two jurisdictional determinations does not support the application of issue preclusion to MacKenzie's subsequent action in the D.D.C. That is particularly relevant here where the Texas court's March 16, 2017 lack of subject matter threshold jurisdictional determination was curable (as acknowledged by the Texas court[20]), and the November 22, 2017 jurisdictional determination was not "essential" or "necessary" to the Judgment

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[18] *See* March 16, 2017 Memo. Opinion and Order, Appendix F

[19] *See* November 22, 2017 Memo. Opinion and Order, Appendix E

[20] *See* March 16, 2017 Memo. Opinion and Order, Appendix F

(because the court had already determined, eight months earlier, that it lacked jurisdiction). *Stebbins v. Keystone Insurance Company*, 481 F.2d 501 (D.C. Cir. 1973).

Thus, the D.C. Circuit's panel decision of July 23, 2021[21], affirming the D.D.C.'s March 18, 2021 dismissal of MacKenzie's action, in part based on issue preclusion, conflicts with the authoritative decisions of other United States Courts of Appeal that have addressed the issue, constituting an intercircuit conflict. The panel decision also conflicts with prior decisions of the D.C. Circuit (*Stebbins v. Keystone Insurance Co.*, 481 F.2d 501 (1973), *Gulf States Utilities Co. v. F.P.C.*, 518 F.2d 450 (D.C. Cir.

[21] *See* July 23, 2021 Order, Appendix A

1975), *AT&T v. F.C.C.*, 602 F.2d 401 (D.C. Cir. 1979)), constituting an intra-circuit conflict.

The proceedings in the Texas court were tainted by unfairness to MacKenzie, corrupting its Judgment.

In *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 328 (1979), this Court stated, "the *requirement of determining* whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is *a most significant safeguard.*" (*emphasis* added) (*See also Blonder-Tongue v. University Foundation,* 402 U.S. 313, 329 (1971)). This Court has also said, "....a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration

require that this be so *unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case*." *Blonder-Tongue v. University Foundation,* 402 U.S. 313, 324-25 (1971) (*emphasis* added). And, this Court has also said, "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or *fairness of procedures* followed in prior litigation. *See* Restatement (Second) of Judgments § 68.1(c) (Tent. Draft No. 4, Apr. 15, 1977)." *Montana v. United States,* 440 U.S. 147, 164 (1979) (*emphasis* added). Collectively, *inter alia*, these statements make clear that the federal common law doctrine of *res judicata*[22] (i.e., claim

[22] *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)

preclusion and issue preclusion) should not be applied when the circumstances of a particular case dictate a different result because of overriding considerations of fundamental fairness to a litigant, creating a "fairness exception" to the general rule of claim and issue preclusion. Those narrow circumstances, concerning fairness to MacKenzie in his prior action in the Texas court, exist here.

In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), this Court made clear that "[The Federal Rules of Civil Procedure are] as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the ....mandate [of a Federal Rule] than they do to disregard constitutional or statutory provisions". The proceedings in the

Texas court were marked by numerous violations of the Federal Rules of Civil Procedure by both Government-defendants and the court. For example, *inter alia*, on June 29, 2015, the Texas court filed its Scheduling Order (Appendix H), setting out the date of February 1, 2016 as the deadline for "Motions Not Otherwise Covered" (*See* Appendix H at 3). On August 9, 2016, more than six months after the Texas court's February 1, 2016 deadline, Government-defendant HUD filed its untimely third Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). On March 16, 2017, instead of denying the Government-defendant's Motion to Dismiss on grounds of untimeliness, the Texas court granted the motion, resulting in the first two alternative determinations against MacKenzie (*See* Appendix F). And, more

than sixteen months after the Texas court's deadline, Government-defendant HUD filed its June 2, 2017 Motion to Dismiss under Fed. R. Civ. P. 12(c) and Government-defendant DOJ filed its June 19, 2017 Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). On November 22, 2017, instead of denying the Government-defendants' Motions to Dismiss on grounds of untimeliness, the Texas court granted the motions, resulting in the final two alternative determinations against MacKenzie (*See* Appendix E).

Yet another example further illustrates the unfairness of the Texas court's proceedings. On July 19, 2016, the Texas court denied Government-defendant HUD's January 22, 2016 second Fed. R. Civ. P. 12(b) Motion to Dismiss (Appendix G), triggering the

Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, *the court must dismiss the action*." (*emphasis* added)). Thus, the Texas court independently violated the Federal Rules of Civil Procedure, raising the specter that all of its subsequent alternative determinations were merely *ultra vires* acts. (*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), "For a court to pronounce upon a law's meaning or constitutionality when it has no jurisdiction to do so is, by very definition, an ultra vires act.").

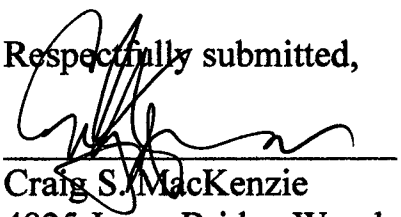
Indeed, the D.D.C.'s and the D.C. Circuit's unwarranted comity to a sister federal court got in the way of the interests of justice for MacKenzie.

CONCLUSION

Petitioner's right to a full and fair opportunity to be heard has been impinged in the U.S. District Court for the Northern District of Texas and, subsequently in the U.S. District Court for the District of Columbia. This petition for a writ of certiorari should be granted to review this issue of public importance.

Dated: December 1, 2021

Respectfully submitted,



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